No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

CHET L. PARKER and LOIS M. PARKER,
Appellants,

-vs-

TITLE AND TRUST COMPANY, a corporation, PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees.

APPELLANTS' REPLY TO BRIEF OF TITLE AND TRUST COMPANY

On Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, Judge.

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APPELLEE'S MISCONCEPTION OF FACTS

At the outset we wish to call attention to what seem to us to be serious errors on the part of the Title Company's attorneys regarding the facts of this case.

Parkers' Information Regarding Title. Counsel are, of course, clearly in error in stating, in effect, on p. 16, that Parkers knew that Winans had no title. The court

made no such finding. The court went as far as any evidence possibly suggested (and rejected Parker's own testimony) when it found that the Parkers had been advised that Winans' title "was in question" (F. 17; R. 128) and that "the United States claimed ownership" (F. 33; R. 135).

The evidence relating to the knowledge of the Parkers is set forth in our original brief, pp. 16-9; and we also call attention to Appendix A of that brief, in which will be found irreconcilable conflicts between the testitimony of Paul Winans and his brother Ross respecting alleged notice to Parkers.

The Contracts Between the Title Company and the Parkers. It is important to note that the first transaction was the order for a *title report* (F. 20; R. 128), the Company noting on its records that a title policy "was subject to a timber cruise" (F. 21; R. 129). Thereafter Parker obtained a purchaser's title policy, having learned from his attorney, Ferris, that he could buy such a policy. It was only for $125,000.00 although at that time he was engaged in negotiations to sell the property for $180,000.00 (See our original br., pp. 13-4).

The Title Company's brief assumes (p. 59) that thereafter it was merely a case of issuing an *owner's* policy in exchange for a *purchaser's* policy, the rights and liabilities otherwise remaining the same. But they are mistaken. The Title Company in the meantime had taken another look at the title. It discovered that there were no means of ingress or egress to or from the property; and so in the owner's policy there was added this

additional exception (R. 45). The Company thus relieved itself of an obligation theretofore incurred.

The "Metsker Map." On pp. 15-6 the brief states that Parker "even professed to know that a school land title would fail if it had not been completely surveyed; and that he always carried a map and checked on whether or not a school land section had been surveyed (R. 1807)". (Br. 15-6). But, as the citation to the record (R. 1807) makes clear, the witness merely purported to state what Parker "professed" as of the time negotiations were being carried on for a possible settlement, not at any prior time.

It is, of course, true that Parker had carried the map, a Metsker map, and, as pointed out in our previous brief (Br. 21), he consulted this Metsker map before going on the property and found that it designated "W. R. Winans" as the owner of the property (Br. 21; see also R. 2213).

But the Title Company before they issued the title report also consulted *their* Metsker map (R. 194, 198-9, 233). Such a map, as the Title Company's brief suggests (p. 16) *does* disclose whether a school land section (and for that matter any other section) has been surveyed. It shows that the property here involved had not been surveyed (Ex. 110; R. 2213). So if, as the Title Company's brief intimates, knowledge that a school land section has not been surveyed should warn an intelligent examiner to search further, and we agree that it should, how can they justify their failure here to search further?

Other Erroneous and Misleading Statements in Title Company's Brief. Page 8. The statement that Stegmann took an option "after conferring with Parker" is entirely unsupported by the evidence.

Pages 8-9. It is said that "phase 2" of the conspiracy was to "inflate the apparent investment so that they could collect more from the Title Company", and (p. 9) in furtherance of this objective the Parkers "attempted to sell the property to Multnomah Plywood Corporation for $180,000.00, in order to show a substantial loss of profit". The uncontradicted evidence is that, although it is said that there was no "conspiracy" until August 16, the cruiser for Multnomah Plywood was asked on August 13 (R. 1307-9) to cruise the property and actually cruised it on the 14th, on which date Parker started negotiations (R. 1307-9, 2218). More detailed facts are given in our original brief, pp. 12-4.

Page 11. The statement that the security for the loan made by the Parkers to Stegmann in 1950 "probably was nonexistent", has no support whatsoever (see R. 393-9).

Pages 13-4. The brief states that on the date that Parker examined the property "Lot 2 . . . was posted with signs advising that it was part of the Bull Run Water Shed of the Mt. Hood National Forest" (R. 1052). What the witness actually said was that he had no information on the subject (R. 1053).

In discussing the legal propositions advanced in the Title Company's brief, we shall have occasion to refer further to what we consider inaccuracies in their state-

ments of fact, in cases where we believe such inaccuracies to be particularly prejudicial.

LEGAL OBLIGATION TO TITLE COMPANY OF APPLICANT FOR TITLE INSURANCE

(Title and Trust Br. pp. 14-24)

As a preliminary matter, we repeat that counsel are in error in stating that the Parkers knew of a "failure of title". The evidence is that they learned that the title title was "questionable" and that the Government made a claim.

Unfortunately counsel misunderstood the language of the Supreme Court of Oregon in *DeCarli v. O'Brien,* 150 Or. 35, 41 P.2d 411, when they cited that case (p. 17) in support of their contention that the title insurer is under no greater duty to the insured than other types of insurers. What the court said was this:

> "A contract guaranteeing a title is one of insurance rather than suretyship, so that it is governed *for purposes of construction* by the rules applicable to other insurance contracts." (150 Or. at 51, 41 P.2d at 417) (Italics added.)

The *Stipcich* case—*Stipcich v. Metropolitan Life Insurance Co.,* 277 U.S. 311, 48 S. Ct. 512, 72 L. Ed. 895—discussed in the Title Company's brief (pp. 17-8)—is a good case to illustrate the distinction between title insurance and life insurance. The physical condition of the insured in that case, making him uninsurable, was a duodenal ulcer. It was discovered by him subsequent to the time that he gave the Company his written applica-

tion. Nobody but the insured and his doctors knew about this. The insurance company could not go to publlic records, as it could in this case, to determine whether there was any reason why the insurance should not be issued. Stipcich paid his personal physicians to determine whether he had an ulcer; in the present case, the applicant paid the insurance company to determine whether a defect existed.

But there is a further important distinction between that case and this one. In giving its opinion in *Stipcich,* the Supreme Court said, in a footnote:

> "The result is often explained by saying that a statement in the application is a 'continuing representation', or 'is made as of the time of the delivery of the policy.' " (277 U.S. at 317, 72 L. Ed. at 898)

In fact this was the basis of the decision of the trial judge, Judge Robert S. Bean of the Oregon District Court, 8 F.2d 285, 286.

We note that the Title Company's brief at no place mentions the leading Oregon case of *Frederick v. Sherman,* 89 Or. 187, 173 P. 575, discussed in our original brief (pp. 25-6), with quotations from authorities set forth therein, but instead relies upon *Musgrave v. Lucas,* 193 Or. 401, 238 P.2d 780. (Br. 20-1). This case was cited in our original brief (p. 26). The quotation set forth in the Title Company's brief (p. 21) does not support any contention that in this case there was any duty to disclose anything to the Title Company. The necessity of a permit to dredge the river in that case emphasized in the Title Company's brief (p. 21), was not the im-

portant consideration. The court stressed two other facts, alleged in the complaint, to which defendant had demurred: (1) A written notice from the District Engineer in which it was "demanded that such acts be discontinued if prosecution was to be avoided" (193 Or. at 412-3); and, even more important, (2) the fact that the complaint alleged (see 193 Or. 407) that "defendants 'for the purpose of injuring and defrauding plaintiffs,' affirmatively and 'fraudulently represented to the plaintiffs that they knew of no reason why plaintiffs should not continue the operation of said sand and gravel business.'" (193 Or. at 413). The case, as stated, was decided on a demurrer to the complaint, not upon evidence.

Nor does the next case cited in their brief (pp. 21-2), *Arthur v. Palatine Insurance Company,* 35 Or. 27, 57 P. 62, aid the Title Company. The policy itself provided that it would be void "if the insured has concealed . . . any material fact" and the opinion (as our original brief pointed out, pp. 33-4) emphasizes that even when a policy so provides much more must be proven than a failure to disclose facts.

This then brings us to the first of the two title insurance case cited in appellees' brief. It is *Vaughn v. United States Title Guaranty & Indemnity Co.,* 137 App. Div. 623, 122 N.Y. Supp. 393, discussed in the brief on pages 22-3. There the purported conveyance to the insured was by means of a forged deed, procured by the insured's agent.

The purpose of procuring the deed was to obtain title insurance, in anticipation of condemnation pro-

ceedings. The court found that the insured had knowledge of facts which advised him that the deed must be a forgery. This deed was, of course, the basis of plaintiff's title and was presented to the title company as such. It was for this reason that the court in the *Vaughn* case denied recovery, for, as the court said:

> "The plaintiff's conduct was equivalent to a representation that, so far as he knew, the deed presented by him was genuine."

Another important distinction between the *Vaughn* case and the present one is that in *Vaughn* the defect was not a matter of record. The importance of this distinction is self-evident. Indeed, it seems to prevail even in cases where a policy provides, as the present policy does not, that a failure to disclose a defect known to the insured shall avoid the policy. Examples of this type of policy were involved in *First National Bank v. N. Y. Title Insurance Co.,* 12 N.Y. Supp. 2d 703, 715, and also in *Vernon v. Title Guarantee and Trust Co.* (Cal. App.), 46 P.2d 191, and in each case the court emphasized that the defect in question was not a matter of record.

Whether or not the policy involved in the *Vaughn* case had any such exception, does not appear from the report.

RELIANCE

(Title and Trust Br. pp. 25-9)

In our first brief (pp. 26-32) we referred to numerous authorities to the effect that one who has at hand the means of acquiring accurate information, particularly

if he actually makes an independent investigation, cannot claim to have relied upon the false statements of another. The Title Company's brief (pp. 28-9) ignores all these authorities, and relies principally upon a long quotation from the Oregon case of *Larsen v. Lootens,* 102 Or. 579, 591, 194 P. 699, 203 P. 621.

Actually, as clearly appears from the quotation which counsel set forth from the *Lootens* case (Br. 28-9) that decision stands for the proposition that while, "in the *ordinary business transactions* of life, men are expected to exercise reasonable prudence, and not rely upon others", nevertheless courts at times are called upon to protect "the simple-minded or unwary" from "positive intentional fraud". This case, accordingly, is not in point unless counsel claim that their title company in selling its expert services is not to be treated as engaging "in the ordinary business transactions of life" but rather in the class of the "simple-minded or unwary".

Furthermore, further language in the *Lootens* case, not quoted in the Title Company's brief, quoting from Ruling Case Law, makes it clear that, in Oregon, one who undertakes an independent investigation "will not usually be heard to say that he had the right to rely on such representations", made by the opposing party. (See 102 Or. at 592-3)

RESCISSION FOR "UNILATERAL MISTAKE"

If the doctrine of "unilateral mistake' as a basis for rescission is as contended for by the Title Company, then, as already suggested, the courts have all been in

grievous error in formulating the rules as to when a party who has been deceived with respect to material facts may and when he may not obtain relief from the courts.

The principal decision relied upon by the Title Company (Br. 30-2) is *Rushlight Co. v. City of Portland,* 189 Or. 194, 219 P.2d 732. There are obvious distinctions between that case and the present one. One of these is that, contrary to the assumption in the Title Company's brief (pp. 31-2), the Rushlight Company was found not to have been negligent. The findings stated:

> "The plaintiff made a substantial mistake in its bid; that said mistake was an honest mistake and was free from culpable negligence on the part of plaintiff." (189 Or. at 200)

This finding was affirmed by the Supreme Court (189 Or. at 205-6).

Another important distinction is based upon the fact that in the *Rushlight* case the question before the court was whether or not a bidder can withdraw his bid before it has been accepted. In other words, the question was whether the City was entitled to retain, as a windfall, $21,472.21 given it by mistake, when it had taken no action whatever, not even of entering into a contract. As said in *Holzmeyer v. Van Doren,* 172 Or. 176, 139 P.2d 778, quoted on p. 32 of the Title Company's brief (involving a release of a mortgage and acceptance of a deed in satisfaction thereof, in ignorance of an intervening lien):

"Some mistakes prejudice no one but those who commit them, and, therefore, cancellation will prejudice no one."

The brief also quotes from the Restatement of Restitution, sec. 59, that "A person who has conferred a benefit upon another by mistake is not precluded from maintaining an action for restitution by the fact that the mistake was due to his lack of care." That this quotation also has reference to benefits conferred upon volunteers is clear when one reads further from the Restatement, particularly comment (a), and the various illustrations given, e.g., an error in describing Blackacre instead of Whiteacre in a deed, or in making a second repayment of money borrowed, forgetting the first repayment, etc.

But the best answer to the Title Company's arguments, that cases such as *Rushlight* have some bearing here, is to take the actual decisions of the Supreme Court of Oregon, rendered both before and after that decision, involving attempts at rescission when actual contracts were entered into under mistakes of fact, the right to such rescission being based on alleged deceit by opposing parties. These cases also are a further answer to counsel's contention (Br. 28-9), already discussed, that *Larsen v. Lootens,* 102 Or. 579, 194 P. 699, 203 P. 621, governs here.

Miller v. Protrka, 193 Or. 585, 238 P.2d 753, decided almost two years after the *Rushlight* case, involved an attempt at rescission of a contract on the basis of alleged misrepresentations. The court noted (193 Or. at 591) the rule of law, apparently invoked by the Title Com-

pany, that "Rescission is often granted where an action for deceit could not be maintained" and that "if the transaction were the result of a false representation of a material fact, it could not stand against the injured party's right to rescind, however honestly made". But the court held there could be no rescission. One of the reasons was:

> "A purchaser must use reasonable care for his own protection and cannot rely blindly on the seller's statements but must make use of his means of knowledge and, failing to do so, cannot claim that he was misled." (p. 598)

To the same effect is *Gamble v. Beahm,* 198 Or. 537, 257 P.2d 882, also a rescission case, in which the court quoted from the leading case of *Shappiro v. Goldberg,* 192 U.S. 232. This was the fourth time the Oregon Supreme Court quoted from that decision, the other three cases, along with the quotation itself, being in our original brief, pp. 28-9.

Other cases in which the Oregon court has held there can be no rescission when parties seeking relief do not exercise diligence in using available means for ascertaining the true facts are *Ziegler v. Stinson,* 111 Or. 243, 252, 224 P. 641, 644, and *Fairbanks v. Johnson,* 117 Or. 362, 368, 243 P. 1114, 1116, referred to in our original brief at pp. 28-9.

IRRELEVANCY OF EVIDENCE OF FORMER TRANSACTIONS

(Title Company's Brief 36-9)

The Title Company's attorneys and ourselves do not seem to be far apart as to the *effect* of the admission of inadmissible evidence in Federal non-jury cases. As we said in our specification of error (Br. 9), elaboration of the specification was unnecessary since the objection was based upon the *irrelevancy* of the evidence; and of course evidence which was irrelevant at the trial does not become relevant when an appellate court is ascertaining the facts from the record made, regardless of the type of objections made in the court below, or whether objections were made at all.

One cannot prove that a man forged a note by proof that at other times he beat his wife or engaged in communistic activities. This cannot be done even to prove "purpose" or "intent". To use evidence of other alleged wrongful acts or transactions for any such purpose they must be of acts *similar* to those involved in the case being tried. Of the several cases we cited on this point (Br. 44-5), the Title Company's brief notes but one, *Wood v. United States,* 16 Pet. 342, 41 U.S. 342, 10 L.ed. 987, and the very portion of that opinion quoted in their brief (p. 38) expressly states that it is only "evidence of other acts and doings of the party *of a kindred character*" that is admissible.

The Title Company's brief also suggests (p. 37) that evidence of other transactions "in which Stegmann had

acted for Parker, either directly or indirectly, was relevant and proper on this issue"—of whether Stegmann was Parker's agent.

In the first place, there certainly is no proof that in other cases Stegmann was an agent for Parker in the purchase of property. The only reference to the record (R. 433-4) given in the brief (p. 37) proves, if anything, the exact opposite. The cited portion of the record has testimony to the effect: (1) that at one time Stegmann was an employee of Parker in "operating a loader"; (2) that there never had been any "arrangement" whereby Stegmann would try to locate timber for Parker (R. 434); and (3) that on one, perhaps two, occasions the Parkers had paid a "finder's fee" to Stegmann in connection with a purchase of timber.

Moreover, while the four cases cited in the brief (p. 37) support counsel's general statement "that an agency may be shown by circumstantial evidence and by a course of dealing" they lend no support whatever to their contention that any "course of dealing" shown here even remotely tends to prove that Stegmann was an agent of Parkers in the purchase of the timberland here involved. *Cooperative Copper, etc., Co. v. Law,* 65 Or. 250, 132 P. 521, involved the question whether one who located some mining claims was at the time an agent of a corporation and therefore under obligation to locate them for the corporation. Correspondence showed that he was. In *Boise-Payette Lumber Co. v. Dominican Sisters,* 102 Or. 314, 202 P. 554, the question was whether an agent for a general contractor was also agent of the owner so as to relieve a materialman of the ne-

cessity of sending a statutory notice to the owner; and despite considerable evidence of a "course of dealing" between the owner and the agent, the court held that there was no evidence of agency. *Held v. Puget Sound and Alaska Powder Co.,* 135 Or. 283, 295 P. 969, involved the question whether an agent who sold blasting powder had authority to warrant that it would produce a certain result. The court held that evidence of similar warranties on prior occasions, admittedly authorized, by the same agent to the same purchaser, was admissible to prove such authority. The last case, *Young v. Neill,* 190 Or. 161, 174, 220 P.2d 89, lays down the rule that in determining whether a husband on a given occasion was agent for his wife "evidence that he previously acted for her in the same type of transaction is admissible", but as the authorities cited in that case, 190 Or. at 174, clearly show, this rule is limited to persons standing in the relation of husband and wife. See particularly *Sidle v. Kaufman,* 345 Pa. 549, 29 Atl.2d 77, 81, and Restatement of Agency, sec. 22, comment (b), pp. 65-6.

EVIDENCE CLAIMED TO PROVE A FRAUDULENT SCHEME

(Title and Trust Br. 39-47)

Without, as we have just shown, pointing to any evidence establishing any agency relationship between the Parkers and Stegmann in the purchase of this property, appellants next launch upon an argument in which such agency is assumed. Considerable stress is laid upon the disagreement between Parker and Winans as to

whether the former was present on the evening that the option was exercised, subsequent to such exercise, August 18. They refer to this as "a crucial incident in the dispute between Winans and appellants".

Actually, as we pointed out in our original brief (p. 48), it would have served Parker's purpose better to have claimed that there was no such meeting. Counsel refer to this contention, but say:

> "The truth of the matter is that by the time Parker testified he realized that he might be chargeable as undisclosed principal with the revelations of Winans concerning the title flaw to his agent, Stegmann." (Title Company's Br. 41)

Accordingly, the brief adds that this was his motive for testifying (falsely they claim) that he was present on this occasion, on August 18.

But if corroboration of Parker's testimony is needed, we call attention to the entry in his diary setting forth what actually happened at the meeting in question (R. 2219). Now it is very clear that at the time the entries were made in this diary there was no such alleged motive to falsify. Mr. Parker testified that the entries ordinarily were made either on the day the events occurred or on the next day, and seldom more than two or three days later (R. 256-7, 1397). This diary, introduced in evidence by the Title Company (R. 1462) had been in the personal possession of Parker's attorney since shortly after December 6, 1951 (R. 1463), when the original complaint was filed—a complaint which made no suggestion that Stegmann was the agent of the Parkers (R. 2241-52).

Ordinarily, of course, a party's own prior statements, oral or written, are not admissible on his own behalf to bolster his testimony at the trial. However, not only was this diary produced at the request of (R. 217), and introduced by, the opposing party (R. 1462), but the principle is well-established that when a contention is made that a witness had a motive to falsify then *consistent* statements made prior to the inception of that motive are admissible. *Maider Steel Products Co. v. Zanello,* 109 Or. 562, 578, 220 P. 155, 161.

In their attempt to present some theory as to what Stegmann and Parker's plans were prior to August 16 (when they say the conspiracy was formed), counsel say (p. 43) that the scheme was that the Parkers "in the guise of innocent purchasers of the option could present Winans with a substantial claim for damages". But if they read the option they knew that the Winans were only agreeing to give a quitclaim deed, so that there could be no damages. Counsel must also have overlooked the legal proposition that an assignee of an option, like the assignee of a contract, gains nothing by being a "innocent purchaser".

ALLEGED BREACH OF POLICY CONDITION

(Title Company's Brief 47-60)

(1) Counsel argue as though this is an action upon the *purchaser's* policy (Br. 47-8). This is coupled with an argument (pp. 59-60) that "this was all one transaction". We have already shown that this could not possibly have been so, because after the purchaser's policy was delivered, and the premium therefor paid,

the Company discovered that both in the title report and in the purchaser's policy they had overlooked something. So in the owner's policy they added another exception, no means of ingress or egress. While it is true that the owner's policy was delivered "in accordance with their previous agreement" (p. 59), the Title Company is in no position, in view of the above important change, to argue that it was purely automatic. Finally, it is argued that the provision in the purchaser's policy "imposed a contractual duty on Parkers to disclose the defect and their failure to do so was a breach of that contract" (p. 60, see also 55), but the provision was *not* a contractual obligation. It was a condition only.

(2) There is no basis even for the assertion (Br. 57) that notice was received after the issuance of the purchaser's policy. That policy was received on September 4, as the Title Company's brief recognizes (pp. 47-8). They argue that *Stegmann* was given information thereafter (p. 57). However, this was nothing more than a repetition of what he had learned before—that the Government claimed the property. Furthermore, whatever may be said about Stegmann's alleged agency in purchasing the property (on which we are in violent disagreement with counsel), nobody can conceivably contend that there was any agency with respect to anything connected with the title insurance. With respect to the other occasion mentioned (Br. 57), that of notice to Kenneth Abraham, the findings affirmatively state that Abraham was not an agent for the purpose of determining the state of the title (F. 26; R. 131); and further,

even prior to obtaining the information, he had paid the balance of the purchase money (R. 132).

(3) It seems to us that counsel have misconstrued the *Hoffman* case (Br. 50-4). The basis of the decision in that case was, as we stated in our original brief (p. 60) that the "information as to the happening of the accident was so indefinite and uncertain in its nature as to constitute no notice to plaintiff that an accident covered by the policy had happened". Now the policy in that case provided that "upon the occurrence of an accident" the company must be notified. In the present case, the language of the policy requires notification to the Company only "upon receipt of notice". Counsel have not commented upon the argument in our brief (p. 59) regarding the meaning of "receipt of notice". Under any logical construction of the language, information received by Parker was not "receipt of notice of any defect, lien or encumbrance".

The case of *Title Insurance Co. of Richmond v. Industrial Bank,* 157 S.E. 710, referred to on page 49, did not reach any of the questions presented here. One of the agreed facts there was that the insured *did* receive a written notice, in the form of a certificate signed by a trustee charged with the responsibility of a sale, setting forth the liens, and the only question was regarding the time within which notice thereof must be given to the Company.

Respectfully submitted,

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